although it is still maintained in form. It has been in answer to this that the great chancellors have stated time and time again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy—by what would be manifestly just in view of all the existing conditions—and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone in placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization."

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THE WINDING UP OF INSOLVENT BUILDING AND LOAN ASSOCIATIONS.

The fact that almost all of the building and loan associations incorporated and doing business under the laws of the State of Virginia, as well as a large number of those chartered and domiciled elsewhere, but doing business here, are now in liquidation, and that few or none of the principal questions that arise under these conditions have been decided in our Supreme Court, has suggested the idea that a few comments on this subject would not be untimely, and might be of some interest to the bar. The subject is a broad one and infinite in detail, therefore only the principal propositions involved can be noticed.

Building and loan associations exist and carry on their operations in this State only by virtue of legislative authority. The first statute authorizing their creation was that of May 29, 1852. This Act was repealed May 1, 1888. In the case of *Crabtree* v. *Old Dominion B. & L. Association*,[1] it was decided that "the Act of 1852, authorizing the voluntary incorporation of building and loan associations, upon the terms prescribed thereby, was an act of general nature and was repealed by section 4202 of the Code"; and further, that "an association organized under the general incorporation act[2] cannot vouch its charter to justify or excuse any violation of the law upon the subject

[1] 95 Va. 671; 4 Va. Law Reg. 12.

[2] Section 1145 of the Code.

of usury." This case further decided that the Act of March 1, 1894,[1] the next Act on the subject, entitled "an Act to define the powers and limitations of building and loan associations," had no retroactive operation which would validate what had been done previous to its passage. From this it will be seen that building and loan association mortgages and contracts, made previous to March 1, 1894, but subsequent to May 1, 1888, the date of the repeal of the former Act, are subject to the penalties of the usury laws. The cases of *White* v. *Mechanic's B. F. Ass'n*[2] and *Winchester Building & Loan Ass'n* v. *Gilbert*[3] were decided before the repeal of the Act of 1852. In those cases, however it is clear that but for the authority of that act the validity of the transactions in question would have been denied. In the former case, on page 245, Judge Anderson says:

"If the transactions and dealings of this association with its members are warranted by statute, and that statute is warranted by the Constitution, though they may operate harshly and oppressively, it is not the province of the court to relieve. The fault is in the law, which the legislature alone can alter, or in the improvidence of the party, which neither the legislature nor the court can remedy."

It is quite certain, however, that mortgages entered into subsequent to the passage of the Act of March 1, 1894, though the association were chartered under the general incorporation act, will be held valid, although the question has never been directly raised and decided. In the *Crabtree* case[4] the court said, "If the transaction under investigation had been subsequent to the passage of that act the question presented to us would have been quite a different one from that which we are called upon to decide. . . . It [the Act] without doubt sanctions and ratifies charters of building and loan associations heretofore granted by courts under section 1145 of the Code." *Smoot* v. *Peoples Perpetual Building & Loan Association*,[5] decided the same day, is hardly a case in point, for there the association set up a special act validating its previous transactions, and the case went off on that point.

In other States and by courts of the highest authority, such contracts have been held valid on the theory that the relation between the members of an association is similar to that between members of a copartnership, and that transactions between them do not constitute loans of money, but are in effect mere agreements between partners that their joint contributions shall be advanced for the use of one or another of the members. In the case of *Hawkins* v. *American Bldg. & Loan*

[1] Acts 1893-4, p. 560. [2] 22 Gratt. 233. [3] 23 Gratt. 787. [4] 95 Va. 671. [5] 95 Va. 687.

Ass'n[1] it was said, "The keystone of the arch upon which these transactions rest and are held legal in this State and free from usury, and without which they would topple into hopeless illegality, is mutuality."[2] Nevertheless, in considering the rights and obligations of members of building and loan associations, chartered under the laws of this State, one must bear in mind that they are subject to the powers and limitations as defined in the Act of March 1, 1894, from which alone they derive their legal existence.

Although building and loan associations can and may be wound up in a variety of ways—such as by the expiration of their franchises under original charter limitations, or in respect to the objects to be accomplished; by a valid and executed agreement of its members; by voluntary surrender of its corporate franchises, and by the action of the legislature[3]—at present the most usual way by which they are terminated is by *decree of a court of chancery.* Under the last-mentioned circumstances alone will the subject be now considered. The principal ground upon which courts interfere with the corporate existence of such associations is *insolvency.* A building and loan association is said to be insolvent when it is unable to satisfy the demands of its own members, whereas the term insolvency is generally used in respect to the debts due by a corporation to outside parties. Judge Grosscup, in *Towle* v. *American Bldg. & Loan Ass'n,*[4] says:

> "The insolvency of such an association is *sui generis.* There can be, strictly speaking, no insolvency, for the only creditors are the stockholders, by virtue of their stock. The so-called insolvency is such a condition of the affairs of the association as reduces the available funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to its stockholders the amount of their cash contributions, dollar for dollar."

When this condition arises it does not, as a matter of course, put an immediate stop to the corporate existence of the association. The members may go on, or they may, with additional time and sacrifice, continue the organization until its losses have been made up, its treasury refilled, and its stock brought to par. The practical difficulty in the way of such a course, however, is its tediousness and unprofitable

[1] 96 Ga. 206.

[2] See also note to Crabtree *v.* O. D. etc. Ass'n, 4 Va. Law Reg. 19; 8 Eng. Law and Eq. Rep. 57; 21 L. J. Ch. 201; 10 Md. 397; 13 Gray, 157; 26 N. J. Eq. 351, and 6 Bingham, 180.

[3] Cooper *v.* Oriental Savings & Loan Ass'n, 100 Pa. 405.

[4] 61 Fed. 446.

character, making it ordinarily an impossible one. The burden upon the investing members would be greatly in excess of anything originally contemplated, and upon the borrowing members would be well-nigh ruinous. Hence, the insolvency of a building and loan association, leaving no prospect of an immediate consummation of its initial design, is recognized, if not as a dissolution of it, at all events as a sufficient ground for the abandonment of the enterprise and for proceeding to wind up the corporation.[1]

In such a case the practice has generally been for the officers of the association, to whom alone its affairs are usually known, to secure the coöperation of one or more shareholders, in whose name a bill in equity is filed, charging insolvency, praying that the association may be wound up, and asking for the appointment of a receiver. In this way most of the associations now in the process of liquidation have gone into the hands of receivers.

It might be well to mention here that although there does not seem to be any reported case on the subject, Judge Waddill, of the District Court of the United States for the Eastern District of Virginia, has recently decided, delivering an oral opinion, that a building and loan association is not such a corporation as is amenable to sec. 4b of the Bankruptcy Law of 1898. In that section the several classes of corporations amenable to bankruptcy are enumerated as "corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." There are many other reasons why building and loan associations are not within the purview of this act, but the above seems to settle the question effectually.

When an association of this kind files a bill and its assets have been taken possession of by a receiver appointed by the court, it will be found as a rule that the assets consist of comparatively no cash, some office furniture and some real estate bought in under foreclosure, and the debts due by borrowing members. This last item constitutes the bulk of the assets. How are they to be realized, and what is to be the rule of collection? These mortgages are given in express terms as payable in instalments only, and the question is, whether they can be presently foreclosed upon the appointment of a receiver. The leading case upon the subject is *Kemp* v. *Wright*.[2] The question was there decided in the affirmative. The doctrine laid down in that case has been followed ever since in England and in most of the United States.

[1] Endlich on Building Associations, p. 498.

[2] 2 Law Reports, Chancery Division (1894).

The case of *Low Street Building and Loan Ass'n.* v. *Zucker,*[1] is interesting and instructive on this subject. Here it is said:

"He [the borrowing member] is not in the position of an ordinary borrower of money; he remains a member of the association, subject to its constitution and by-laws; and in taking advances on his share he is only allowed to anticipate, for a premium, or bonus, the final redemption of all the shares when the funds realized shall be sufficient to pay each unredeemed share the sum of $100 over and above all the losses and liabilities. Such being the nature of the contract and the relation of the mortgagors to the association, the facts undisputed that the association is insolvent, its affairs in the hands of a receiver, with no prospect of ever resuming its former operations, and without the slightest chance of ever paying to the shareholders of the unredeemed shares the fixed value of $100 a share, become most material in determining the rights of the mortgagors. From these facts it is manifest that the event will never accrue, even if the corporation is not actually dissolved, when the mortgagors, according to the terms of their covenants, could be released from the payment of weekly dues, or from the risk of incurring fines and forfeitures for non-payment. Under the circumstances of the association, therefore, and its inability to carry out in good faith the contract as originally contemplated, the parties must occupy the position that they would occupy if the association were dissolved. And treating the case upon that footing, it falls immediately within the principle in the case of *Windsor* v. *Randill.*[2] In that case the association had been dissolved, and, speaking of the rights of mortgagors who had given a mortgage on the redemption of the shares as in this case, this court said that by the dissolution of the association before the period originally contemplated and the alteration of the articles, the mortgage contract was at an end. It was impossible for them to perform the covenants contained in their mortgages, and that they were entitled to have them released upon the payment of the sum justly due."[3]

Strange as it may seem, however, the case of *Cason* v. *Seldner,*[4] is one of the very few decisions where the contrary doctrine has been laid down. The court there held that:

"When a shareholder has his shares redeemed, the terms of his contract are evidenced by his bond, and his trust deed given to secure his bond, and cannot be varied. . . . If these terms be to pay monthly instalments and interest on the sum borrowed, and he is not in default, he cannot be required to pay the same *in solido.* The sum advanced is a part of his debt. His obligation is to pay in lieu of the sum advanced the monthly instalments as he contracted and no more."

To carry out literally the ruling of this case would be to require a receiver to conduct an insolvent building and loan association to a

1 48 Md. 448.

2 40 Md. 172.

3 See also Brownlie *v.* Russell, 8 App. Cas. 235; People *v.* Low, 117 N. Y. 187; 4 Pa. Dist. Rep. 6.

4 77 Va. 293.

successful termination, a thing that the highest authorities, as has been before seen, declare to be an impossibility, and the proper ground for an order to wind up. While it is impossible to reconcile this decision with the overwhelming weight of authority as above cited, attention is called to the fact that the building association there involved was one organized and existing under the old Building Association Act, which contemplated the formation of a limited society with many restrictions, rather than a corporation with an unlimited number of shareholders, with unassessable liabilities as such. The question of non-joinder of parties and bad faith both entered into the case, and the decree was in the nature of a decree for the specific performance of a contract. For these and other reasons it is believed that should the case of an insolvent association, chartered under the recent Act, go to our court of last resort, a decree, requiring the borrowers to pay forthwith "an amount justly due" would be ordered.

The next question which presents itself for consideration is what is the proper basis of settlement with borrowing members. The borrower is as much a shareholder as the investing member—the only difference is that instead of expecting to receive in cash the par value of his stock at maturity, as the investing member does, he hopes to apply a like sum, derived from a like source, to the payment of his loan. Upon the failure of the enterprise, it would be manifestly unjust and inequitable to visit the entire loss upon either the one or the other. It should be so adjusted as to fall upon them equally, with due regard to their respective holdings of stock. The borrower should be credited on his loan only with what he has paid in on that account, that is, with what he has paid on account of interest and premiums. The premium being an extra charge paid by the borrower on account of the supposed advantages accruing to him from the terms of payment of his mortgage, is properly credited on the loan account. He would then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the non-borrower for what he has paid in upon his stock. These accounts—the stock, interest and loan accounts—are usually kept separate upon the books of the association, so that no practical difficulty arises in ascertaining the amount paid in on each. In *Stroham* v. *Franklin etc. Ass'n*[1] the rule is thus clearly stated:

"Charge the defendant with money actually received by him, treating the same as due and drawing interest from the day received, and credit him thereon

[1] 115 Pa. 273.

by payments of interest and premiums, with six per cent. interest on the several instalments, computed according to the average time of monthly payments, ascertain the balance due, and give recovery for such amount; let the amount paid by the defendant as dues on his stock stand to his credit on the books of the association until the time for final adjustment, when he and all other shareholders, borrowers and non-borrowers, will be paid *pro rata* from the funds for ultimate distribution."

Although there is no case in Virginia dealing with the rights of borrowing members in an insolvent association, our Supreme Court has recognized the distinction between liability on his stock and on account of his loan, in deciding the rights of a borrower in a going concern. In *Campbell* v. *Building Ass'n*[1] it was said that "the fact that he is a borrowing member does not alter this relation, and he can only have credit at the time fixed for the maturity of his stock for what that stock has then earned."

Different rules have been followed in other cases, partly from a failure or refusal of courts to recognize the dual relation of the borrower to the association and partly from the variety of plans and methods adopted by different associations. The rule, however, above indicated, is certainly consistent with the general theory of building and loan associations, and it has in its support the decisions of the highest courts of the land.[2]

The rights and liabilities of borrowing members having been discussed, we shall now take up the rights of those members who have given notice, under the by-laws, of their intention to withdraw before said association has been declared insolvent. The right of a shareholder to withdraw his subscription to stock upon notice is peculiar to building and loan associations, and has resulted most disastrously to such concerns, in that it has depleted their treasuries at times when money was most necessary for their successful operation.

The rights of those whose notices have not matured before insolvency occurred need not be considered, for nowhere are they given a priority over other members of an insolvent association in respect to the assets of the association. The real question is whether those members whose notices have already matured before insolvency was declared are to be considered as creditors, or are to have only the rights of members that have not given notice. On this point there has been serious conflict of opinion.

[1] 95 Va. 445.

[2] 89 Pa. 15; 20 L. W. R. 430; 2 Am. & Eng. Enc. Law (1st ed.), 639, and authorities cited.

The English cases have held that, under their statutes, members who have given notice to withdraw, and whose notices have matured before the date of dissolution, are, notwithstanding the winding up, entitled to priority according to the dates of their notices, when such priority is given to withdrawing members by a rule of the association. The priority is not lost by the fact of dissolution.[1]

Many of the early American cases followed this line of decisions, but our more recent decisions and those entitled to greater consideration have taken the opposite view. The latter doctrine certainly seems to be the correct one. The withdrawing shareholder does not sever his connection with his association until he has been settled with, and he has no right to a settlement in full with a concern whose capital is impaired, even though it has not been declared insolvent, without being first charged with his proportionate share of its losses. To hold otherwise would be to nullify the whole idea of mutuality, which, as has before been seen, permeates all of the transactions of such associations. According to these decisions, it makes no difference whether he knew the association was insolvent or not when he gave his notice. It is the association's actual condition at that time which decides his position. If it were solvent when he gave his notice he is entitled to be paid in full; if it were insolvent he must stand on the same footing with all other members.[2]

The contention has been made in a number of cases that the holder of certificates of full paid, or prepaid, stock, issued by a building and loan association, calling for dividends at regular intervals, are creditors of the association, as distinguished from its other members, and, again, that their stock is a preferred stock and they are entitled to be paid in full before the holders of the running or instalment stock receive anything. Neither of these positions has been allowed as far as our research has gone. In *Chiswell's Appeal*,[3] the court said: "All parties purchased stock in good faith, and without the fault of any of said stockholders, so far as the record discloses, the society failed; now it is sought to cast the entire loss on the holders of common stock. The holders of paid up stock have no equity to make such demand, nor do we think the court has any power to grant it." [4]

[1] Barnard v. Tomson, 1 Ch. 374; *Re* Ambition Invest. Bldg. Soc. 1 Ch. 95, and others.

[2] See 35 L. R. A. 289; 65 Ill. App. 131; 100 Pa. 448; 102 Pa. 184; 43 Ohio, 371; 58 Minn. 340, and Endlich on Building Associations, 103. Compare Andrews *v.* Roanoke etc. Co., 98 Va. 445, 6 Va. Law Reg. 334.

[3] 100 Pa., 488.

[4] See 117 N. Y. 175; 25 Pittsburg L. J. 39; 58 Minn. 340; 42 L. R. A. 209, and 75 Fed. Rep. 938.

Building and loan association mortgages and contracts made in one State, but to be performed in another State, are, as a rule, governed by the law of the place of performance. This general rule of law, in regard to contracts, has been distinctly announced in this State. It is to be regretted that West Virginia and North Carolina have departed from it in regard to contracts of building and loan associations, where it has subserved the interests of their citizens to do so.[1]

After the assets are all collected and the debts all paid, the time for distribution has arrived. The funds then in the hands of the receiver represent the contributions of the subscribers after charging them with the losses sustained and the costs of administration, and all that can be equitably done with it is to pay it back to the contributor, dollar for dollar, or as nearly so as possible. The prepaid, or fully paid, stockholders have received dividends periodically on their stock, usually at the rate of six per centum per annum, therefore, in order to equalize this advantage they have had over the holders of instalment stock, it has been customary to allow the latter six per cent. for the average time covered by their payments in determining the amount of their claim upon which the dividend is to be paid.

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[1] For the law of Virginia, see Building Assoc'n *v.* Ashworth, 91 Va. 706; Nuckles *v.* People's B. & L. Assoc'n, 93 Va. 680; and Wade *v.* Bankers L. & I. Co., 95 Va. 680.